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AMERICAN SAFETY RISK RETENTION GROUP, INC.  
6  
7

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 AIU INSURANCE COMPANY, a New York corporation,

13 Plaintiff,

14 vs.  
15

16 ACCEPTANCE INSURANCE COMPANY, A Delaware corporation; TIG SPECIALTY  
INSURANCE COMPANY, a California  
17 corporation; ROYAL INSURANCE  
COMPANY OF AMERICA, a Delaware  
18 corporation; AMERICAN SAFETY RISK  
RETENTION GROUP, INC., a Vermont  
19 corporation; and DOES 1 through 10,  
inclusive,

20 Defendants.  
21

No. C 07 5491 PJH

ANSWER AND AFFIRMATIVE  
DEFENSES OF AMERICAN SAFETY  
RISK RETENTION GROUP, INC. TO  
COMPLAINT BY AIU INSURANCE  
COMPANY

Complaint Filed: October 29, 2007

22  
23 Defendant AMERICAN SAFETY RISK RETENTION GROUP, INC. ("Defendant")  
24 answers the complaint filed in this matter by Plaintiff AIU INSURANCE COMPANY  
25 ("Plaintiff"), as follows:

26 1. Answering Paragraph 1, Defendant lacks sufficient information or belief to admit  
27 or deny the allegations contained therein and on that basis denies each and every allegation  
28 therein.

1           2.       Answering Paragraph 2, Defendant admits that some of the underlying lawsuit  
2 which gave rise to this lawsuit were filed in the County of San Mateo. Defendant lacks sufficient  
3 information or belief to admit or deny the remaining allegations contained in paragraph 2 and on  
4 that basis denies each and every such allegation.

5           3.       Answering Paragraph 3, Defendant lacks sufficient information or belief to admit  
6 or deny the allegations contained therein and on that basis denies each and every allegation  
7 therein.

8           4.       Answering Paragraph 4, Defendant lacks sufficient information or belief to admit  
9 or deny the allegations contained therein and on that basis denies each and every allegation  
10 therein.

11          5.       Answering Paragraph 5, Defendant lacks sufficient information or belief to admit  
12 or deny the allegations contained therein and on that basis denies each and every allegation  
13 therein.

14          6.       Answering Paragraph 6, Defendant lacks sufficient information or belief to admit  
15 or deny the allegations contained therein and on that basis denies each and every allegation  
16 therein.

17          7.       Answering Paragraph 7, Defendant lacks sufficient information or belief to admit  
18 or deny the allegations contained therein and on that basis denies each and every allegation  
19 therein.

20          8.       Answering Paragraph 8, Defendant admits that it is a Vermont corporation,  
21 incorporated February 10, 1988, with its principal place of business in Atlanta, Georgia and that it  
22 was authorized to engage in the business of insurance, and was engaged in the business of  
23 insurance, in California at all times relevant herein. Except as specifically admitted herein,  
24 Defendant denies each and every remaining allegation contained in paragraph 8.

25          9.       Answering Paragraph 9, Defendant lacks sufficient information or belief to admit  
26 or deny the allegations contained therein and on that basis denies each and every allegation  
27 therein.

28          10.       Answering Paragraph 10, Defendant lacks sufficient information or belief to admit

1 or deny the allegations contained therein and on that basis denies each and every allegation  
2 therein.

3 11. Answering Paragraph 11, Defendant lacks sufficient information or belief to admit  
4 or deny the allegations contained therein and on that basis denies each and every allegation  
5 therein.

6 12. Answering Paragraph 12, Defendant lacks sufficient information or belief to admit  
7 or deny the allegations contained therein and on that basis denies each and every allegation  
8 therein.

9 13. Answering Paragraph 13, Defendant lacks sufficient information or belief to admit  
10 or deny the allegations contained therein and on that basis denies each and every allegation  
11 therein.

12 14. Answering Paragraph 14, Defendant lacks sufficient information or belief to admit  
13 or deny the allegations contained therein and on that basis denies each and every allegation  
14 therein.

15 15. Answering Paragraph 15, Defendant lacks sufficient information or belief to admit  
16 or deny the allegations contained therein and on that basis denies each and every allegation  
17 therein.

18 16. Answering Paragraph 16, Defendant admits that it issued commercial general  
19 liability policy no. XGI 00-1462-001, which was effective March 1, 2000 to March 1, 2001.  
20 Except as specifically admitted herein, Defendant denies each and every remaining allegation  
21 contained in paragraph 16.

22 17. Answering Paragraph 17, Defendant admits that the above-described commercial  
23 general liability policy no. XGI 00-1462-001 contained limits of liability of \$1,000,000 per  
24 occurrence and \$1,000,000 products-completed operations aggregate limit, subject to a self-  
25 insured retention of \$50,000 as set forth in form ES 98 01 08 99 contained within that policy.  
26 Except as specifically admitted herein, Defendant denies each and every remaining allegation  
27 contained in paragraph 17.

28 18. Answering Paragraph 18, Defendant lacks sufficient information or belief to admit

1 or deny the allegations contained therein and on that basis denies each and every allegation  
2 therein.

3 19. Answering Paragraph 19, Defendant admits that it is informed and believes that  
4 Rylock was engaged in the business of window manufacturing and is alleged to have installed  
5 windows in homes located in California and elsewhere that were allegedly defective such that  
6 they caused the intrusion of water. Defendant lacks sufficient information or belief to admit or  
7 deny the remaining allegations contained in paragraph 19 and on that basis denies each and every  
8 such allegation.

9 20. Answering Paragraph 20, Defendant lacks sufficient information or belief to admit  
10 or deny the remaining allegations contained in paragraph 20 and on that basis denies each and  
11 every such allegation.

12 21. Answering Paragraph 21, Defendant admits it asserts that the self-insured  
13 retention of \$50,000 as set forth in form ES 98 01 08 99 contained within the above-described  
14 policy no. XGI 00-1462-001 is a condition precedent that must be paid over in its entirety by  
15 Rylock. Except as specifically admitted herein, Defendant denies each and every remaining  
16 allegation contained in paragraph 21.

17 22. Answering Paragraph 22, Defendant lacks sufficient information or belief to admit  
18 or deny the allegations contained therein and on that basis denies each and every allegation  
19 therein.

20 23. Answering Paragraph 23, Defendant lacks sufficient information or belief to admit  
21 or deny the allegations contained therein and on that basis denies each and every allegation  
22 therein.

23 24. Answering Paragraph 24, Defendant lacks sufficient information or belief to admit  
24 or deny the allegations contained therein and on that basis denies each and every allegation  
25 therein.

26 25. Answering Paragraph 25, Defendant incorporates by this reference his answers to  
27 paragraphs 1-24 above as though fully set forth herein.

28 26. Answering Paragraph 26, Defendant admits that the self-insured retention as set

1 forth in form ES 98 01 08 99 contained within the above-described policy no. XGI 00-1462-001  
2 has not been satisfied and cannot be satisfied other than by the insured, Rylock. Except as  
3 specifically admitted herein, Defendant denies each and every remaining allegation contained in  
4 paragraph 26.

5 27. Answering Paragraph 27, Defendant admits that form ES 98 01 08 99 contained  
6 within the above-described above-described policy no. XGI 00-1462-001 provides that Rylock is  
7 obligated to pay over the full \$50,000 self-insured retention to meet the terms of the self-insured  
8 retention endorsement. Defendant lacks sufficient information or belief to admit or deny the  
9 remaining allegations contained in paragraph 27 and on that basis denies each and every such  
10 allegation.

11 28. Answering Paragraph 28, Defendant admits the allegations contained therein.

12 29. Answering Paragraph 29, Defendant incorporates by this reference his answers to  
13 paragraphs 1-28 above as though fully set forth herein.

14 30. Answering Paragraph 30, Defendant admits there is a dispute concerning  
15 Plaintiff's obligations to Rylock and whether or not the policies issued by defendant Royal  
16 Indemnity Company have been exhausted. Defendant lacks sufficient information or belief to  
17 admit or deny the remaining allegations contained in paragraph 30 and on that basis denies each  
18 and every such allegation.

19 31. Answering Paragraph 31, Defendant lacks sufficient information or belief to admit  
20 or deny the allegations contained therein and on that basis denies each and every allegation  
21 therein.

22 32. Answering Paragraph 32, Defendant lacks sufficient information or belief to admit  
23 or deny the allegations contained therein and on that basis denies each and every allegation  
24 therein.

25 **ANSWER TO PLAINTIFFS' PRAYER FOR RELIEF**

26 Answering Plaintiff's Prayer for Relief, Defendant denies that Plaintiff is entitled to any  
27 relief against this answering Defendant, including the relief requested in the complaint. All  
28 allegations of the complaint not specifically admitted in this answer are hereby denied.

1 **AFFIRMATIVE DEFENSES**

2 FIRST AFFIRMATIVE DEFENSE

3 Defendant alleges that the complaint, and all causes of action contained therein, fail to  
4 state facts sufficient to constitute a cause of action against defendant.

5 SECOND AFFIRMATIVE DEFENSE

6 Defendant alleges that the complaint, and each cause of action contained therein, is barred  
7 by the applicable statutes of limitation, California Code of Civil Procedure §§ 335 through 349.4.

8 THIRD AFFIRMATIVE DEFENSE

9 Defendant alleges that plaintiff failed and neglected to use reasonable care to protect itself  
10 and to minimize the losses and damages complained of, if any there were.

11 FOURTH AFFIRMATIVE DEFENSE

12 Defendant alleges that plaintiff has waived and/or is estopped from asserting any claims  
13 against defendant.

14 FIFTH AFFIRMATIVE DEFENSE

15 Defendant alleges that plaintiff has failed to mitigate its damages, if any there were.

16 SIXTH AFFIRMATIVE DEFENSE

17 Defendant alleges that plaintiff cannot recover because plaintiff was a volunteer.

18 SEVENTH AFFIRMATIVE DEFENSE

19 Defendant alleges that plaintiff's claims are barred by plaintiff's unclean hands and by  
20 laches.

21 EIGHTH AFFIRMATIVE DEFENSE

22 Defendant alleges that plaintiff cannot recover because it would be inequitable for  
23 plaintiff to recover from defendant.

24 NINTH AFFIRMATIVE DEFENSE

25 Defendant alleges that defendant has no obligation to defend or indemnify under the  
26 subject policy issued by defendant, because the claims and damages alleged do not fall within the  
27 policy's terms, definitions or conditions or do fall within the exclusions set forth in the policy.

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1 TENTH AFFIRMATIVE DEFENSE

2 Defendant alleges that defendant has no obligation to defend or indemnify under the  
3 subject policy issued by defendant, because the claims and damages alleged do not fall within the  
4 insuring clause of the policy.

5 ELEVENTH AFFIRMATIVE DEFENSE

6 Defendant alleges that defendant has no obligation to defend or indemnify under the  
7 subject policy issued by defendant, because the claims and damages alleged fall within exclusions  
8 of the policy.

9 TWELFTH AFFIRMATIVE DEFENSE

10 Defendant alleges that defendant has no obligation to defend or indemnify under the  
11 subject policy issued by defendant, because one or more conditions of the policy have not been  
12 satisfied.

13 THIRTEENTH AFFIRMATIVE DEFENSE

14 Defendant alleges that if plaintiff in fact sustained any damages or injuries by reason of  
15 any alleged act, omission, negligence or other fault on the part of defendant, such acts, omissions,  
16 negligence or other fault were passive or secondary in character, whereas the positive act,  
17 omission, negligence and other fault of plaintiff was active, primary and preliminary in character;  
18 as a result of which plaintiff is not entitled to contribution from defendant.

19 FOURTEENTH AFFIRMATIVE DEFENSE

20 Defendant alleges that defendant's conduct was not the cause in fact or the legal or  
21 proximate cause of any injury, loss or damage alleged by plaintiff or any other party to this action.

22 FIFTEENTH AFFIRMATIVE DEFENSE

23 Defendant alleges that if any fault or negligence is found on the part of this defendant, that  
24 said fault or negligence should be compared with the fault or negligence of the plaintiff and all  
25 other parties herein and apportioned accordingly and that there should be equitable indemnity and  
26 equitable apportionment against all parties.

27 SIXTEENTH AFFIRMATIVE DEFENSE

28 Defendant alleges that the subject policy issued by defendant is subject to a Self-Insured

1 Retention that has not been satisfied, which is a condition precedent to any obligation of  
2 Defendant to provide indemnity, coverage or a defense under the subject policy.

3 SEVENTEENTH AFFIRMATIVE DEFENSE

4 Defendant alleges that defendant's obligations, if any, under the subject policy are  
5 discharged, released or excused.

6 EIGHTEENTH AFFIRMATIVE DEFENSE

7 Defendant alleges that plaintiff is barred from recovering from defendant because of the  
8 doctrine of judicial estoppel.

9 NINETEENTH AFFIRMATIVE DEFENSE

10 Defendant alleges that plaintiff, plaintiff's insured, and/or other persons or entities failed  
11 to perform and/or comply with all applicable provisions of the subject policy.

12 TWENTIETH AFFIRMATIVE DEFENSE

13 Defendant alleges that defendant has no duty to defend or indemnify under the subject  
14 policy because the alleged claims and/or losses were not fortuitous and were known losses, such  
15 that insurance for such losses is barred by statute, public policy and common law.

16 TWENTY-FIRST AFFIRMATIVE DEFENSE

17 Defendant alleges that plaintiff's claims against defendant are barred because plaintiff is  
18 not the real party in interest.

19 TWENTY-SECOND AFFIRMATIVE DEFENSE

20 Defendant alleges that plaintiff has a duty to participate in the defense of the insured upon  
21 exhaustion of any one of the underlying policies, and plaintiff may have an obligation to  
22 reimburse defendant Royal Indemnity Company if it fails properly to drop down.

23 TWENTY-THIRD AFFIRMATIVE DEFENSE

24 Defendant alleges that plaintiff has no equitable right against Defendant, as plaintiff has  
25 not incurred more than its fair share of defense or indemnity costs to support any claim against  
26 Defendant.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to set out its claims with sufficient particularity to permit this answering Defendant to raise all appropriate defenses. This answering Defendant accordingly reserves the right to add additional defenses as the factual bases for plaintiff's claims become known.

**DEMAND FOR JURY TRIAL**

Defendant hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

WHEREFORE, having fully answered the complaint, Defendant respectfully requests judgment as follows:

1. Dismissing the complaint in its entirety and with prejudice;
2. Awarding Defendant its reasonable attorney's fees incurred herein;
3. Awarding Defendant its costs and disbursements to be taxed; and,
4. Awarding Defendant such other and further relief as the court deems just and appropriate.

Dated: December 19, 2007

VOGL & MEREDITH LLP

By /s/ David A. Firestone

DAVID A. FIRESTONE

Attorneys for Defendant

AMERICAN SAFETY RISK RETENTION  
GROUP, INC.